IN THE SUPREME COURT OF THE UNITED STATES

No. 01-595

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

ANGELA RUIZ,

RESPONDENT.

S. Ct. U.S.
FILED
DEC 7 2001
CLERK

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Angela Ruiz, asks leave to file the attached Brief in Opposition to the United States' Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: 7 December 2001

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BRIEF FOR RESPONDENT IN OPPOSITION TO UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether before pleading guilty, a criminal defendant has a constitutional right to obtain material exculpatory information, including impeachment material, from the government.

2. If so, whether that right may be waived through a plea agreement.

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ANGELA RUIZ,

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BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

Respondent Angela Ruiz respectfully requests that the Court deny the Solicitor General's petition for a writ of *certiorari* filed on behalf of the United States.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001).

JURISDICTION

On March 5, 2001, the Ninth Circuit entered its judgment. The government's petition for rehearing and suggestion for rehearing *en banc* was denied on June 11, 2001. United States' Petition for a

Writ of Certiorari (Pet.), App. at 40a. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall ... be deprived of life, liberty, or property without due process of law... .

STATEMENT OF THE CASE

On August 13, 1999, Respondent attempted to enter the United States at the Tecate Port of Entry as the driver of a 1970 Mercury Cougar. [ER 9].[1] Hidden in the vehicle were 66.3 pounds of marijuana. [ER 9]. Respondent was arrested and made her first court appearance on August 16, 1999. [CR 3; ER 68].

On August 23, 1999, Respondent was offered a plea agreement. [ER 6-7]. The government's offer consisted of a two page letter providing that Respondent would (1) waive her right to indictment and plead guilty to an information within thirty days of the initial appearance before a magistrate judge; (2) not file or argue any motions; (3) agree to waive her right to appeal the sentencing decision of the district court or otherwise challenge her judgment and sentence; and (4) waive her right to receive certain

[1] "ER" refers to the Excerpt of Record filed in the Court of Appeals. "CR" refers to the district court clerk's docket entries.

Brady[2]/Giglio[3] information. [ER 6-7]. Initially, Respondent did not explicitly reject the government's offer which included a promise on the part of the government to recommend a downward departure from the Sentencing Guideline for participation in the government's "fast-track" disposition program.

The case, however, was subsequently indicted on September 8, 1999. [CR 6; ER 4-5]. Respondent was charged with one count of importing marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841. [CR 6; ER 4-5]. Respondent declined to accept the government's "fast-track" offer on the basis of her objection to the requisite waiver of her Brady/Giglio rights. [ER 12]. On October 12, 1999, Respondent entered a guilty plea to a charge of importing marijuana, in violation of 21 U.S.C. §§ 952 and 960. [CR 15; ER 61-64]. There was no plea agreement.

At sentencing, the prosecution opposed a departure for "fast track" stating that the government is "giving up all the benefits that would normally come with the fast track departure." [ER 55; RT 4]. The defense argued that Respondent was entitled to a "fast track departure". [ER 55-56; RT 3-4]. Defense counsel stated, Respondent "did not file any motion [sic]. She did everything that

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] Giglio v. United States, 405 U.S. 150 (1972).

someone in her position would normally do but for the disagreement over the language in the standard plea agreement." [ER 54-55; RT 2-3]. The district court stated that a "plea bargain [is] a matter of contract that's an offer and acceptance." [ER 56-58; RT 4-6]. The district court did not make any factual findings and did not grant any departures. [ER 58; RT 6-7]. Respondent was sentenced to a term of 18 months in custody.

Respondent appealed, arguing that the district court had discretion to depart, discretion that it did not acknowledge it had, because the government's insistence on a so-called "Brady/Giglio" waiver constituted unconstitutional conduct on the part of the government. The government argued that while it recognized its continuing responsibility to produce exculpatory evidence of the defendant's actual innocence of the charged offenses, it could constitutionally seek a waiver of a defendant's right to receive material exculpatory evidence that went to impeachment of government witnesses or to any affirmative defense. Brief for Appellee United States at 24.

The Ninth Circuit reversed and remanded for a resentencing hearing. Following its previous decision in Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995), the Ninth Circuit reaffirmed that a criminal defendant has a due process right to receive material exculpatory evidence in the possession of the government prior to entering a guilty plea. Ruiz, 241 F.3d at 1164. Relying

on Sanchez's conclusion that Brady disclosure is essential to a "knowing" and "voluntary" guilty plea, the Ninth Circuit concluded that "[t]he disclosure of Brady evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a plea." Id. The Ninth Circuit further held that the right to this necessary predicate to a voluntary and intelligent plea of guilty could not be waived. Id. at 1164-65.

Judge Tallman dissented, arguing that various policy considerations militated against the constitutional requirement recognized by Sanchez and reaffirmed by the majority opinion. Id. at 1176-77 (Tallman, J., dissenting).

ARGUMENT

In holding that a defendant is entitled to receive Brady/Giglio[4] information -- a limited subset of exculpatory evidence that meets the stringent test of materiality -- prior to entering a guilty plea, the Ninth Circuit joined the Second, Sixth and Tenth Circuits, all of which hold that Brady[5] applies in the

---

[4] Because material exculpatory evidence and material impeachment evidence are constitutionally indistinguishable, see United States v. Bagley, 473 U.S. 667, 676 (1985), both types of evidence will be referred to collectively as Brady information.

[5] Respondent will refer to the Court's decision in Brady v. Maryland, 373 U.S. 83 (1963) as "Brady." When discussing the Court's decision in Brady v. United States, 397 U.S. 742 (1970), respondent will use the full title, "Brady v. United States."

context of a guilty plea. Far from effecting the "radical change in guilty plea practice in the federal system" posited by the government in its petition, Pet. at 7, the Ninth Circuit merely followed the lead of the Second Circuit's approach adopted in Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988), a decision rendered over a decade ago.

By asking the Court to hold that Brady does not apply in the guilty plea context, the government ignores the facts that it took a contrary position below and that the wealth of lower court opinions refutes its position. Indeed, in holding that Brady applies in the context of a guilty plea, the Second, Sixth, Ninth and Tenth Circuits have carefully applied the Court's decisions analyzing both Brady and the role played by counsel in advising defendants as to which plea to enter. The lower courts have concluded that just as a guilty plea may be invalidated as involuntary and unknowing by defense counsel's failure to discover material exculpatory evidence and advise his client accordingly, the failure of the government to disclose such material evidence similarly renders a plea of guilty involuntary and unknowing by effectively precluding the effective assistance of counsel. Any other result would be anomalous: defense counsel's failure to discover a particular material fact would invalidate the plea while the government's concealment of the same fact would not.

The decisions of the Second, Sixth, Ninth and Tenth Circuits do not conflict with the Court's Brady jurisprudence. None of the Court's decisions applying Brady, all of which have involved convictions by way of trial, have discussed Brady's potential application to convictions secured by way of guilty plea. Thus, the government's suggestion that the rule articulated by these Circuits conflicts with the Court's Brady jurisprudence is incorrect. In fact, consistent with Brady and the role it plays in the context of trial and sentencing, pre-plea Brady disclosure will have the effects of (1) ensuring the reliability of guilty pleas by discouraging the innocent from pleading guilty and (2) preserving the reputation of judicial proceedings by preventing prosecutorial authorities from inducing guilty pleas by withholding exculpatory evidence. On the other hand, the government's current position that it need not disclose any Brady material at all prior to a guilty plea, a position it did not properly present below, unjustifiably increases the risk that innocent but risk-averse defendants will accept favorable plea bargains and needlessly demeans the values underlying the Brady decision itself.

Nor are the government's policy concerns, such as its fear that application of Brady to guilty pleas will necessarily lead to "open file" discovery of non-material and even inculpatory evidence in criminal cases, well taken. Pet. at 7. The Second Circuit has easily rejected a claim that its Brady analysis requires immediate

production of all impeaching material, material or otherwise; its rule applies only to material exculpatory evidence. See In re United States v. Coppa, 267 F.3d 132 (2d Cir. 2001) (reversing district court's broad discovery order but also reaffirming that Brady material must be disclosed prior to any guilty plea).

Finally, the Ninth Circuit correctly concluded that the right to receive pre-guilty plea Brady material cannot be waived. Because a guilty plea must be knowing and voluntary, and a guilty plea entered without Brady disclosure is not knowing and voluntary, Brady disclosure cannot be waived. Morever, the Court has made clear that no "waiver" rationale may be employed where the procedural principles at issue are "so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably discrediting the federal courts." United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (internal quotations, brackets, citations omitted). As a bedrock due process right that is specifically directed "to the reliability of the fact-finding process," id., the right to Brady material cannot be waived.

A. This Case is Not the Appropriate Vehicle to Address the Issues Raised in the Petition Because the Government Failed To Present Its Main Position Below

In its petition for a writ of *certiorari*, the government principally argues that it has no obligation at all to produce Brady material prior to a guilty plea, regardless of whether the

information relates to factual innocence or impeachment. Pet. at 7-9. This argument was presented to neither the district court nor the original three judge panel of the Ninth Circuit.

Rather, the government set forth in its proposed plea agreement that "*[t]he Government understands* it has a continuing duty to provide ... information establishing the factual innocence of the defendant." Appendix D to Government's Petition for a Writ of *Certiorari* at 45a-46a (emphasis added). Similarly, in its Response Brief filed in the Ninth Circuit, the government argued that "[t]he plea agreement acknowledges the Government's duty to disclose 'exculpatory' information indicating actual innocence of the defendant as opposed to 'exculpatory' information which is based in impeachment information." Brief for Appellee United States at 24. It was not until the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed in the Ninth Circuit and the instant petition for a writ of *certiorari* that the government took its current position that it need disclose no Brady material at all prior to a defendant's guilty plea.

The Court does not ordinarily consider issues not properly raised in the lower courts. Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1969) (citations omitted); accord Delta Airlines v. August, 450 U.S. 346, 362 (1981). Pursuant to Rule 15.2 of this Court, respondent objects to the consideration of this question based on the position asserted by the government in the district

court and in the Ninth Circuit. As a result, the petition should be denied because the government's main position was not properly presented to the lower courts.

B. A Guilty Plea Entered In the Absence of the Disclosure of *Brady* Material Is Not Knowing and Voluntary

Brady "hold[s] that the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87 (emphasis added). Thus, only *material* favorable evidence is subject to disclosure. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); accord Bagley, 473 U.S. at 681-82 (Blackmun, J., sep. op.); id. at 685 (White, J., concurring). Evidence is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would be different.'" Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Bagley, 473 U.S. at 682).

Brady itself made clear that the right it described was not limited to trial of issues of guilt: it applies to "evidence [that] is material either to guilt or to punishment." Brady, 373 U.S. at 87 (emphasis added). In Strickler, Justice Souter made clear the breadth of Brady's application to the bifurcated sentencing procedures in that case, procedures which gave both the jury and the trial court a role. "[T]he [Brady] prejudice enquiry does not

stop at the conviction but goes to each phase of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation." Strickler, 527 U.S. at 297 (Souter, J., concurring in part and dissenting in part) (citing id. at 292-96 (maj. op.)). Thus, although it is true that the Court has yet to address Brady's application to the guilty plea process, it has made it clear that Brady's application is not limited to trial on liability issues alone.

1. The Lower Courts Agree That *Brady* Applies Pre-Plea

The lower courts have, however, addressed the issue and found that Brady is applicable to the guilty plea process. See, e.g., United States v. Persico, 164 F.3d 796, 804 (2d Cir. 1999) ("The Government's obligation to disclose Brady materials is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable (exculpatory and impeachment) evidence known to the Government") (citation omitted). While the rationales of the lower courts have varied slightly, each of them analyzes the pre-guilty plea Brady obligation in the context of the Court's decisions in Brady v. United States, 397 U.S. 742, and Hill v. Lockhart, 474 U.S. 52 (1985). For instance, the Ninth Circuit has concluded that a

guilty plea "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'" Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (quoting Miller, 848 F.2d at 1320). The Second Circuit has offered a slightly different rationale, observing that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." Miller, 848 F.2d at 1320.

Whichever rationale is employed, a substantial body of caselaw supports the notion that Brady applies to guilty pleas. See United States v. Walters, 269 F.3d 1207, 1214 (10th Cir. 2001) ("under certain limited circumstances, 'the prosecution's violation of Brady can render a defendant's plea involuntary'") (quoting United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994)); United States v. Ross, 245 F.3d 577, 583 n.1 (6th Cir. 2001) (recognizing that a defendant may file a post-plea Brady claim) (citing Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985));[6] Tate v. Wood, 963 F.2d

[6] The government suggests that the Sixth Circuit's decision in Campbell is somehow contrary to the Ninth Circuit's approach. See Pet. at 21. Actually, Campbell observed that under this Court's decisions, the petitioner's guilty plea "did not ... insulate all misconduct of constitutional proportions from judicial scrutiny solely because the misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." Campbell, 769 F.2d at 321. Ultimately, the Campbell court found it unnecessary to resolve the issue of whether Brady applied pre-plea, primarily due to the defendant's inability to demonstrate prejudice. Id. at 323-24. Ross, which the government does not address in its petition, unequivocally states that the Sixth Circuit "has recognized that a state

20, 24-25 (2d Cir. 1992) (material exculpatory evidence must be disclosed prior to the guilty plea); White v. United States, 858 F.2d 416, 423-24 (8th Cir. 1988) (finding that the exculpatory evidence at issue "was significant and ... it should have been disclosed" but habeas relief denied due to lack of materiality); Banks v. United States, 920 F. Supp. 688, 691-92 (E.D.Va. 1996) (following the cases cited herein); United States v. Millan-Colon, 829 F. Supp. 620, 635-36 (S.D.N.Y. 1993), aff'd, 17 F.3d 14 (2d Cir. 1994) (following Miller and Tate);[7] Daniel P. Blank, Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide To Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011 (2000) (hereinafter "Plea Bargain Waivers"); Erica G. Franklin, Comment,

defendant may raise, *after a plea of guilty*, a claim that prosecutors withhold (sic) exculpatory information in violation of Brady." 245 F.3d at 584 n.1 (emphasis added). Thus, the Sixth Circuit's position is not contrary to that of the Ninth Circuit.

[7] The Ninth Circuit's position also enjoys substantial support in the state courts. State v. Parsons, 775 A.2d 576, 580-81, 341 N.J. Super. 448, 455-56 (2001) (agreeing with Sanchez); State v. Sturgeon, 605 N.W.2d 589, 231 Wis.2d 487 (1999) (allowing withdrawal of guilty plea due to Brady violation); Gibson v. State, 514 S.E.2d 320, 324-25, 334 S.C. 515, 523-24 (1999) (agreeing with Sanchez); State v. Gardner, 885 P.2d 1144, 126 Idaho 428 (1994) (allowing withdrawal of guilty plea due to Brady violation); Villareal v. State, 860 S.W.2d 529, 532-33 (Ct. App. Tex. 1993) ("withholding ... [material] evidence [from a defendant pleading guilty] amount[s] to a denial of [the defendant's] federal and state constitutional rights to due process and due course of law") (citing Ex Parte Lewis, 587 S.W.2d 697, 699-701 (Tex. Crim. App. 1979)); Scroggins v. State, 859 S.W.2d 704 (Mo. App. 1993) ("The principles of Brady are applicable to the entry of a plea of guilty") (citation omitted).

Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers, 51 Stan. L. Rev. 567 (1999); Kevin C. McMunigal, Disclosure and Accuracy In the Guilty Plea Process, 40 Hastings L.J. 957 (1989) (hereinafter "Disclosure and Accuracy").*

Thus, although the government complains that the Ninth Circuit's decision is "unique," Pet. at 20, when compared to other lower court authority, it glosses over the fact that the overwhelming weight of this authority refutes its position that Brady does not apply in the guilty plea context. Moreover, the government's contention that no other court "has gone as far" as the Ninth Circuit is a red herring, Pet. at 22, as no other court has had the opportunity to address the issue of Brady waivers in plea agreements. In other words, no court has disagreed with the Ninth Circuit's invalidation of Brady waivers. If anything, the fact that no other court has had the opportunity to address the

* The Fifth Circuit, in dicta, has suggested that the right recognized in Brady was solely trial-based, see Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir.), cert. denied, 531 U.S 830 (2000), although even that court acknowledges that the contrary view enjoys wide support. See id. at 358. The facts that Brady explicitly held that its rule applies to the issues of both liability and punishment, 373 U.S. at 87, and that Bagley makes clear that the Brady materiality test requires analysis of whether the "result of the *proceeding* would be different," 473 U.S. at 682 (emphasis added), rather than solely whether the result of the *trial* would have been different, refute the Fifth Circuit's suggestion that the right recognized in Brady was solely trial-based.

specific issue weighs against granting the petition. Rather than granting the petition at this time, the Court should have the benefit of other lower court opinions on the specific issue and should also wait to see if a conflict ever arises.

2. ***Hill v. Lockhart* Supports The Conclusion That A Plea Entered Without Disclosure of Material Exculpatory Evidence Is Involuntary**

In addition to its reliance on the decisions of its sister Circuits, the Ninth Circuit has explained that a guilty plea entered without disclosure of material exculpatory evidence is involuntary. See Sanchez, 50 F.3d at 1453; accord Walters, 269 F.3d at 1214 ("under certain limited circumstances, 'the prosecution's violation of Brady can render a defendant's plea involuntary'"). The government argues that the Ninth Circuit's analysis of Brady v. United States overlooks the Court's observation that "'[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.'" Pet. at 13 (quoting Brady v. United States, 397 U.S. at 756-57). As a result, the government argues, even though "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecutor's case,'" Sanchez, 50 F.3d at 1453 (quoting Miller, 848 F.2d at 1320), and even though the decision-making process may be adversely

affected by the lack of disclosure of Brady material, the validity of the guilty plea is not implicated because the guilty pleas of defendants who "misapprehend[] the quality of the State's case or the likely penalties," Brady v. United States, 397 U.S. at 756-57, are nonetheless valid.

The government's argument ignores Hill v. Lockhart, 474 U.S. 52, which strongly supports the Ninth Circuit's view that a guilty plea entered in the absence of Brady disclosure is "involuntary" under Brady v. United States, as well as the Court's other decisions assessing the validity of convictions entered by way of guilty pleas. The Court's cases emphasize the role of the advice of counsel in establishing that guilty pleas are voluntarily and intelligently made. See Brady v. United States, 397 U.S. at 758; accord Tollett v. Henderson, 411 U.S. 258, 267 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970). The Court made clear in Hill, however, that "[w]here, as here, a defendant is represented by counsel during the guilty plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" 474 U.S. at 56 (quoting McMann, 397 U.S. at 771). Thus, a plea of guilty based upon sub-standard advice is involuntary and therefore invalid. Id.; accord McCarthy v. United States, 394 U.S. 459, 466 (1968) ("if a defendant's guilty plea is not equally voluntary and knowing, it

has been obtained in violation of due process and is therefore void") (footnote omitted).

In explicating the "prejudice" inquiry to be undertaken in a case where a defendant asserts a claim that his plea is involuntary due to ineffective assistance of counsel at the plea stage, Hill employed defense counsel's failure to uncover exculpatory evidence as an illustration.

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill, 474 U.S. at 59. Based on this analysis, the failure of counsel to discover a particular exculpatory fact - a fact which would likely cause counsel to advise rejection of a plea agreement - renders the guilty plea violative of the Sixth Amendment and therefore involuntary.

The Ninth Circuit's pre-plea Brady analysis is based upon an analogy to Hill's Sixth Amendment analysis: "[e]vidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.'" United States v. Ruiz, 241 F.3d 1157, 1166 (9th Cir. 2001) (quoting Sanchez, 50 F.3d

at 1454).[9] Sanchez relied on Miller in adopting this test. See Sanchez, 50 F.3d at 1454 (citing Miller, 848 F.2d at 1322).

The Second Circuit's adoption of the foregoing test was informed by the Court's derivation of the post-trial Brady test. In Bagley, Justice Blackmun's separate opinion, joined by a majority of the Court, adopted the Sixth Amendment materiality test established in Strickland v. Washington, 466 U.S. 668, 694 (1984), as applicable to post-trial Brady claims. See Bagley, 473 U.S. at 681-82 (Blackmun, J., sep. op.); accord id. at 685 (White, J.,

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[9] The government insists that the Ninth Circuit's analysis logically compels the conclusion that the government must turn over not only material exculpatory evidence, but also inculpatory evidence in order for the defendant to maximize his knowledge of the government's case prior to pleading guilty and that this sort of broad disclosure is inconsistent with the Court's cases. Pet. at 14-15. Quite to the contrary, the Ninth Circuit's materiality test can *never* require the disclosure of inculpatory evidence: no defendant could ever claim that "but for the failure to disclose [even more inculpatory evidence], [he] would have refused to plead and would have gone to trial.'" Ruiz, 241 F.3d at 1166. Moreover, the government's concerns, which are based on the Ninth Circuit's observation that "'a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the government's case," id. at 1164, ignore the limitations inherent in the Brady doctrine: the Ninth Circuit's analysis, like that of the Second Circuit, requires no more than the disclosure of material exculpatory evidence. See Coppa, 267 F.3d at 142. While guilty pleas would no doubt be even more "knowing" and "voluntary" if all evidence were disclosed, including inculpatory evidence, the Ninth Circuit's rule applies to Brady material alone. See Ruiz, 241 F.3d at 1164 (requiring production of "material information withheld by the prosecution"). At any rate, much of the government's inculpatory evidence is already otherwise discoverable, upon request, under Fed. R. Crim. P. 16. Thus, the government's objections are both unfounded and overstated.

concurring). The Sixth Amendment basis for the Brady materiality test was later reaffirmed in Kyles. See 514 U.S. at 433-34.[10] In view of the Court's emphasis on its Sixth Amendment jurisprudence in evaluating Brady due process claims, the Second Circuit concluded that Sixth Amendment concepts were equally applicable to pre-plea Brady claims.

> [W]e consider it useful in the present case to look to the Supreme Court's discussion of materiality in Hill v. Lockhart, . . . which involved a claim that the defendant's decision to enter a plea of guilty was caused by the ineffective assistance of his counsel.

Miller, 848 F.2d at 1322. Thus, Miller adapted Hill's Sixth Amendment test to a due process Brady claim and concluded that the Brady test should focus on whether the undisclosed evidence created a "reasonable probability" that the defendant "would have insisted on going to a full trial." Id.[11]

Rejection of the analysis contained in Hill and adoption of the government's approach would lead to anomalous results. For

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[10] Strickland itself derived its test from United States v. Agurs, 427 U.S. 97, 104, 112-13 (1976) and United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982), both of which are Fifth Amendment cases. See Strickland, 466 U.S. at 694. Strickland's derivation of its test only serves to emphasize the inter-relatedness of the Fifth and Sixth Amendment questions posed by the failure of the government to disclose, and of defense counsel to discover, material exculpatory information.

[11] A hypothetical illustrates this point. If defense counsel's failure to learn that a key witness had suffered a conviction of perjury would violate the Sixth Amendment under Hill, then the government's failure to disclose that a significant unidentified witness had suffered that same conviction violates the Fifth Amendment.

example, in Jacobson v. United States, 503 U.S. 540 (1992), the Court found that Jacobson had been entrapped as a matter of law into receiving visual depictions of minors engaging in explicit sexual acts due to the conduct of various government agencies in soliciting orders from him. If Jacobson had entered a guilty plea without knowing that those who solicited him were government actors, thereby foregoing his entrapment defense, the question of whether his plea was voluntary or not would depend - under the government's approach -- solely on whether or not his counsel should have discovered the fact that the solicitors were government agents. If counsel should have discovered that fact, Jacobson's plea would be involuntary because he pleaded guilty without knowing a fact reasonably likely to cause him to go to trial: the availability of an entrapment defense. See Hill, 474 U.S. at 59. By the same token, if the government had successfully concealed the identity of the solicitors, such that counsel could not have discovered it, Jacobson's plea would suddenly be voluntary.

It would be bizarre indeed if the voluntariness of Jacobson's plea were to depend upon the government's skill at concealing material exculpatory facts. Hill, 474 U.S. at 56, makes clear that a plea is not voluntary if the defendant is kept in the dark as to material exculpatory facts; it should not matter who is at fault for the defendant's ignorance. In other words, the identity of the responsible party is not logically related to the voluntariness of the defendant's plea. If defense counsel is at fault, then the Sixth Amendment provides relief under Hill. But if it is the

government that has failed to disclose the information, then Brady's Fifth Amendment analysis should apply. See Ruiz, 241 F.3d at 1165 (analogizing to ineffective assistance of counsel claims in concluding that "the failure to disclose Brady evidence ... invalidates the plea agreement").[12]

The Second Circuit took a slightly different approach, reasoning that the failure to disclose Brady information prior to a guilty plea could invalidate that plea because Brady v. United States applied "only in the absen[ce] of misrepresentation or other impermissible conduct by state agents." Miller, 848 F.2d at 1320 (citing Brady v. United States, 397 U.S. at 757). Because the non-disclosure of material exculpatory evidence constitutes "impermissible conduct by state agents," Miller held "that even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material

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[12] The government's conduct in withholding material exculpatory evidence that cannot be discovered by defense counsel would have the effect of preventing counsel from offering adequate advice at a critical stage of the prosecution. See Williams v. Kaiser, 323 U.S. 471, 475-76 (1945) (the assistance of counsel is fundamental to the decision to plead guilty because "[o]nly counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate"). Because "'[t]he right to counsel is the right to the effective assistance of counsel,'" Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970)), the government would essentially prevent the defendant's exercise of his Sixth Amendment right to counsel. "The Court has uniformly found constitutional error ... when counsel was ... prevented from assisting the accused during a critical stage of the proceeding. United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (collecting cases).

evidence withheld by the prosecution." Id. Thus, the Second Circuit posited a pre-plea Brady obligation, but it did not apply Hill's voluntariness analysis, instead concluding that a Brady violation satisfied the misconduct exception recognized by Brady v. United States.

Even so, the Second Circuit relied upon Hill's prejudice analysis to determine materiality, Miller, 848 F.2d at 1322, the same test the Ninth Circuit adopted. See Ruiz, 241 F.3d at 1166. Thus, even though the Second and Ninth Circuits applied somewhat different approaches to Brady v. United States, both agreed that Hill's analysis was nonetheless applicable. This minor analytical divergence is of no moment, however, as there is no disagreement between the Second and Ninth Circuits on whether or not Brady applies pre-plea: both correctly hold that it does. See Coppa, 267 F.3d at 142 ("Brady material must be disclosed in time for its effective use ... at a plea proceeding"); Ruiz, 241 F.3d at 25 (describing the right to receive pre-plea Brady material as a "due process right").

3. The Principles Underlying *Brady* Support Its Application Pre-Plea

a. Pre-plea *Brady* disclosure advances the interest in accuracy of guilty pleas and the goals of fairness and legitimacy in the criminal justice system

Even if the Court declines to adopt the Ninth Circuit's analysis of Hill, the Second and Ninth Circuits have nonetheless correctly concluded that due process requires pre-plea Brady

disclosure because such disclosure serves to ensure the reliability of convictions entered by way of guilty plea and to advance the goals of fairness and legitimacy in the criminal justice system. First, the disclosure of material exculpatory evidence will tend to encourage innocent, but risk averse, defendants to exercise their trial rights rather than to plea bargain, thus vindicating the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Because such defendants are likely to receive more attractive plea offers,[13] disclosure will serve to bolster those innocent defendants who are more likely to succumb to a substantial difference in potential penalty.[14]

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[13] Defendants with a more significant chance of acquittal are likely to receive more attractive offers from prosecutors who are risk averse. See generally Disclosure and Accuracy, 40 Hastings L.J. at 990-92.

[14] While cases of innocent defendants pleading guilty are difficult to identify, some have come to light. See, e.g., Paul Duggan, 13 Years After a Murder, DNA Gives Texan Freedom; Bush's Office Ignored Confession By Another, Washington Post Service, Jan. 18, 2001, News Section at 3 (man who entered guilty plea exonerated); Matt Lait and Scott Glover, 4th Inmate Expected to Be Freed[;] Rampart: Widening Police Scandal May See 40 or More Convictions Overturned, Los Angeles Times, Metro Desk, 1999 WL 26200706, November 30, 1999 (same); see also Barry Scheck et al, Actual Innocence 92 (2000) (noting that 23% of the DNA exonerations studied by the Innocence Project were based on false confessions or admissions).

Second, disclosure will also serve to prevent miscarriages of justice in cases involving offenses containing elements that are either outside the defendant's knowledge or are based upon application of objective standards. As for the former category of offenses, numerous crimes contain elements that are outside the defendant's personal knowledge. For example, a number of offenses require that the victim have attained a certain age. A defendant may well not have personal knowledge of the victim's age and lack access to evidence that calls that element into question, evidence that the government may possess due to its superior access to the victim or to confidential public records. Similarly, in a bank robbery case, see 18 U.S.C. § 2113(a), a defendant would typically lack any personal knowledge of the FDIC insurance element that the government may possess. Even the availability of certain defenses may turn on facts outside the defendant's knowledge, as is the case in entrapment, in which the defendant may not know that the person who solicited him was a government agent. In these hypotheticals, the defendant lacks conclusive knowledge of his guilt or innocence, thus making pre-plea disclosure of exculpatory evidence even more significant. See generally Disclosure and Accuracy, 40 Hastings L.J. at 972-75 (describing situations in which the defendant lacks sufficient knowledge accurately to determine his guilt).

As to the latter category, numerous defenses and offense elements turn on the analysis of objective factors, such as the

reasonableness of one's conduct or the justifiability of a particular course of conduct. See generally Disclosure and Accuracy, 40 Hastings L.J. at 976-80 ("It is problematic to expect the typical defendant pleading guilty to provide accurate answers to questions such as the reasonableness of the defendant's conduct or belief, or the justifiability of taking a particular risk, in the same way that we rely on a defendant pleading guilty to reveal the truth about his own conduct or subjective mental state"). Again as an example, a claim of self defense frequently requires a showing of the reasonableness of the defendant's fear, an objective fact that could be corroborated by facts of which the defendant was unaware. See, e.g., United States v. James, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (defendant's self defense theory was corroborated by documentary proof of victim's prior violent acts even though the defendant had never reviewed the documents). Because "[s]elf-defense is about as basic a moral and legal principle there is," id. at 1215 (citation omitted), no legitimate policy could be served by allowing James to enter a guilty plea without disclosure of the documents which corroborated the victim's violent past had she been unaware of them and had the government possessed them. Objective determinations are frequently required in offense elements as well. See, e.g., 8 U.S.C. § 1324(a)(1)(ii), (iii) and (iv) (permitting liability for various alien smuggling offenses

based upon the defendant's "reckless disregard" of the illegality of the alien's presence in the United States).[15]

Finally, non-disclosure implicates the fairness considerations that animated Brady. "[O]ur system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87. "[D]isclosure will serve to justify trust in the prosecutor as the representative ... of a sovereignty ... whose interests in a criminal prosecution is not that it shall win a case, but that justice shall be done." Kyles, 514 U.S. at 439 (quotation omitted). A constitutional rule permitting the suppression of *all* Brady material gives rise to a prosecutorial incentive "'to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas,'" Ruiz, 241 F.3d at 1164

[15] In Henderson v. Morgan, 426 U.S. 637 (1976), the Court considered a case involving a homicide statute which permitted a finding of increased liability based upon what was apparently a purely objective standard. Henderson involved a homicide in which a second degree murder charge was filed, but the defense contended that a manslaughter charge was more appropriate under the facts, including the defendant's limited mental abilities. The second degree murder charge, however, included as an element the requirement that the "assault was committed with a design to effect the death of the person killed." Id. at 645 (internal quotations, footnotes omitted). The Court observed that the crucial "element of the [second degree murder] offense might have been proved by the objective evidence *even if respondent's actual state of mind was consistent with innocence or manslaughter.*" Id. (emphasis added). Thus, the existence of objective evidence - of which the defendant may not have been aware - may have been dispositive. The failure to disclose exculpatory evidence relevant to the application of this objective standard could lead to a plea of guilty by a defendant whose "actual state of mind was consistent with innocence or manslaughter." Id.

(quoting Sanchez, 50 F.3d at 1453), and demeans the values underlying Brady.[16]

b. **The Court should not create a pre-plea exception to Brady based upon the government's policy arguments**

The government advances a number of policy justifications for its request that the Court allow it to withhold *all* Brady material from defendants considering guilty pleas. Ruiz's holding, however, is constitutional; it cannot be rejected solely upon reconsideration of the policy implications of the decision. See Ruiz, 241 F.3d at 1167-68. Nevertheless, the government's arguments are unconvincing.

[16] In the event that the Court rejects the Ninth Circuit's analysis of Hill and the application of Brady prior to entry of a guilty plea, the Court should nonetheless exercise its supervisory power to require such disclosure. See, e.g., Jencks v. United States, 353 U.S. 657 (1957) (exercising the Court's supervisory power to order discovery of the prior statements of witnesses); Roviaro v. United States, 353 U.S. 53 (1957) (exercising supervisory power to order discovery regarding informants under some circumstances); see also United States v. Campbell, 874 F.2d 838, 851 (1st Cir. 1989) (characterizing Jencks and Roviaro as involving the exercise of the Court's supervisory power); United States v. Fischel, 686 F.2d 1082 (5th Cir. 1982) (same as to Roviaro). The analysis in the foregoing section supports the exercise of this Court's authority. In addition, the "[f]ederal courts have an independent interest in ensuring criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 160 (1988). By requiring such disclosure, the Court will hold prosecutors to high ethical standards and enhance fairness.

For instance, the government rejects any notion that pre-plea Brady disclosure would serve to discourage the innocent from pleading guilty, asserting that in any post-conviction proceeding

> [t]he essence of a defendant's Brady claim at that point is not that his solemn admissions of guilt were false. Instead, the claim is that, if the government had disclosed a particular piece of evidence, the defendant would have recalculated the risks and benefits of his options and opted to go to trial rather than pleading guilty.

Pet. at 18-19. As a threshold matter, the government's argument, as set forth above, is difficult to reconcile with Hill. Presumably, the government would also seek to dismiss the claim of a criminal defendant raising ineffective assistance of counsel by arguing that the essence of such a claim was not innocence but rather a desire to "recalculate[] the risks and benefits of his options," albeit with better advice. The Court rejected that sort of reasoning in Hill, concluding that the claim went to the validity of the plea: a plea based on such advice was not voluntary. Hill, 474 U.S. at 56; accord McCarthy, 394 U.S. 466. The same analysis should apply here: regardless of the government's (apparently omniscient) view that a defendant making a post conviction attack does not also assert his innocence, the non-disclosure of Brady material invalidates the plea by rendering it involuntary. An involuntary plea violates due process and is void, whether or not there is also a claim of innocence asserted. Hill, 474 U.S. at 56; accord McCarthy, 394 U.S. 466.

The government's concern for the finality of judgments, Pet. at 19, is also addressed in Hill, which concluded that "requiring a showing of 'prejudice' from defendants who seek to challenge the validity of guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas." Hill, 474 U.S. at 58 (citation omitted); see also Strickland, 466 U.S. at 694 ("[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker"). Because any successful Brady claim includes, by definition, a showing of materiality, see Strickler, 527 U.S. at 281-82, the pre-plea disclosure rule adopted by the lower courts provides precisely the same assurance that the finality of judgments will not be unnecessarily disturbed.

But even apart from the analogy to Hill, the government's assertion that all post-conviction Brady claims are not, in essence, claims of innocence overstates the efficacy of the guilty plea process in separating the innocent from the guilty. While it is true that the Court views plea bargaining as "not only an essential part of the process but a highly desirable part," Santobello v. New York, 404 U.S. 257, 261 (1971), the Court has also acknowledged that it cannot "say that guilty plea convictions

hold no hazards for the innocent." Brady v. United States, 397 U.S. at 757.[17] In Brady v. United States the Court observed that

> we take great precautions against unsound results, and we should continue to do so whether the conviction is by plea or trial. We would have serious doubts about this case if the encouragement of guilty pleas by offer of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.

Id. Although in Brady v. United States the Court expressed confidence that trial "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel," id., the government now proposes a rule that can only undermine that confidence. Essentially, the government urges the Court to enable it to deny defendants the very information defense counsel needs to provide "adequate advice:" material exculpatory evidence. If it were true that "guilty plea convictions [held some] hazards for the innocent," when Brady v. United States was decided, those hazards will be greatly increased in the event the government's view

[17] Moreover, to the extent that the government focuses on a defendant's effort to disown his previous sworn declarations of guilt, that concern is completely absent in cases where a nolo contendere plea is entered, see Fed. R. Crim. P. 11(b), or when the defendant pleads guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), without providing a factual basis. Even where there is a factual basis provided, Hill, 474 U.S. 52, still provides a basis to challenge a guilty plea: it contains no "factual basis" exception. See also Fed. R. Crim. P. 32(e) (permitting guilty plea to be withdrawn prior to sentencing for "any fair and just reason" and also containing no "factual basis" exception).

prevails, and it gains the ability to withhold material exculpatory evidence from defendants contemplating guilty pleas.

In addition to its view that application of Brady to guilty pleas will somehow not advance the interests of innocent defendants, the government also insists that the lower courts will not be able to confine the requisite disclosures to material exculpatory evidence. Pet. at 14-15. The government's fear is unfounded. The Second Circuit has already rejected a district court's discovery order that went beyond the scope of the general rule that Brady material must be disclosed prior to a guilty plea, reasoning that "we have never interpreted due process of law as requiring more than that Brady material must be disclosed in time for its effective use at trial ... or at a plea proceeding...." Coppa, 267 F.3d at 142 (citations omitted). The Brady materiality standard, as applied in Coppa, simply obviates the government's concerns that it might be required to conduct open file discovery.

The government also fears that the Ninth Circuit's approach "could endanger government witnesses, disrupt ongoing investigations, and require additional commitment of scarce resources to cases before entry of guilty pleas." Pet. at 23. The government again overlooks the strict limitations imposed by the materiality requirement. Ruiz does not require the wholesale disclosure of the identities of informers, although occasionally it may. Sanchez illustrates this point: Mr. Sanchez did not prevail

because his assertion that he would have pursued entrapment and outrageous governmental misconduct claims if he had known the identities of the informants was rejected because it was not objectively reasonable. See 50 F.3d at 1454. Therefore, the evidence he was denied was neither material nor subject to disclosure. Id. In those few cases where the information is material, such as those where a defendant who is not predisposed to commit drug offenses is induced to do so by a government informant, the balance, as tilted by the antecedent determination of materiality, properly favors disclosure.[18]

Finally, the argument that Ruiz creates a burden on prosecutors by requiring them to collect and assess evidence at an earlier stage in order to determine if it constitutes Brady material is equally unavailing. As an initial matter, the government appears to concede that its prosecutors already look for and disclose exculpatory evidence before guilty pleas, as it repeatedly states that it is only "impeachment" information that it does not routinely disclose. Pet. at 9, 23. Until now, there have

[18] The government has provided no evidence that the absence of Brady waivers will have a devastating impact on criminal investigations. See Mezzanatto, 513 U.S. at 209 n.6 ("Respondent has failed to offer any empirical support for his apocalyptic predictions"). There is also no evidence that Brady waivers are common, even though the government's claimed concerns certainly are. In other words, if a controversial Brady waiver was so vital to the government's investigations, this issue likely would have been raised long before the instant case.

been no complaints that prosecutors have been overburdened by their efforts to disclose such exculpatory information pre-plea, and certainly the system has not come to a grinding halt based on these pre-plea efforts.

Also, the government's complaint about having to do more work at the initial stages of a case conflicts with its contentions regarding finality. Certainly, finality concerns are better addressed by a rule which requires early disclosure. Such a rule eliminates post-conviction claims when exculpatory information comes to light well after resolution of a case. The government's concern about the plea bargaining process also "focuse[s] entirely on [its] incentives and completely ignores the other essential party to the transaction: the [defendant]." Mezzanatto, 513 U.S. at 207. While a prosecutor may wish to do even less work in a plea bargain case, a defendant is often less likely to accept a plea agreement where he must give up his right to receive exculpatory information, as exemplified by what happened in this very case. Indeed, Brady waivers have inhibited the plea bargaining process in various judicial districts. See Plea Bargain Waivers, 68 Fordham L. Rev. at 2043-44 and n.189 (detailing the impasse created in the Northern District of California by the government's effort to require waivers similar to the one at issue here).

Moreover, the government will not dispute that the "fast-track" plea bargain program in the Southern District of California

has survived in the wake of Ruiz. That program has proceeded in the same fashion, simply without the inclusion of Brady waiver provisions in the plea agreement. And, the government cannot claim that there has been an alarming slow down in prosecutions in the Ninth Circuit because prosecutors are now so busy spending their time looking for impeachment information before a defendant pleads guilty.

To the extent that Brady waivers relieve prosecutors of their duty to collect and evaluate potential Brady evidence, due process concerns are demeaned. See Strickler, 527 U.S. at 280 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police"). As to any claim of difficulty in assessing such information pre-plea, Kyles counsels prosecutors to err on the side of disclosure. 514 U.S. at 439 ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on the trial's outcome as to destroy confidence in its result"). There is no reason to believe that the pre-plea Brady test is any more difficult to apply than the post-trial test; the government "cannot avoid [its] responsibility" to ensure that guilty pleas are entered knowingly and voluntarily. Id.

C. **The Right To Pre-Plea Brady Disclosure Cannot Be Waived Because It Is A Necessary Incident to a Knowing and Voluntary Plea and Because Such Disclosure Is Fundamental to the Reliability of the Fact-Finding Process**

The government also contends that, even if a defendant has a right to receive Brady information before pleading guilty, that right can be waived. Pet. at 15-16. As an initial matter, the government appears to concede that if disclosure of Brady information is necessary to a knowing and voluntary guilty plea, then the right to receive such information cannot be waived in a plea agreement. Indeed, the government does not challenge the Ninth Circuit's holding in this regard and instead simply relies upon its position that the disclosure of Brady information is not a prerequisite to a knowing and voluntary guilty plea. Id. at 15. Of course, respondent has shown that the disclosure of such information is necessary to a knowing and voluntary guilty plea, and therefore further consideration of the "waiver" issue is unnecessary given the government's concession, a concession that is well taken. See McCarthy, 394 U.S. at 459 ("if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"); Waley v. Johnston, 316 U.S. 101, 104 (1942) (if a guilty "plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction").

Nevertheless, even if this Court finds that disclosure of Brady information is not required to ensure a knowing and voluntary guilty plea, the right to receive such information still cannot be waived pursuant to a plea agreement.[19] While the government correctly states that the Court has recognized that many fundamental rights are waivable, see Mezzanatto, 513 U.S. at 201, it incorrectly contends that the right to receive Brady information is indistinguishable from such waivable rights. Pet. at 16. Instead, the right to receive Brady information is one of those rights that "are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.'" Mezzanatto, 513 U.S. at 204 (citation omitted).

Unlike the right in Mezzanatto, which was found to be waivable because it involved the suppression of evidence and therefore did

[19] The government contends that if the right to receive Brady information in the guilty plea context is not rooted in the requirement of a knowing and voluntary guilty plea, then it could only be rooted "in an expansion of the due process holding in Brady itself . . . ." Pet. at 16. For reasons explained earlier, this contention is doubly flawed. First, the right to receive exculpatory information in the guilty plea context does not require an *expansion* of Brady, as the government readily conceded in the district court and in the Ninth Circuit. Second, even if the Due Process holding in Brady somehow did not apply in the guilty plea context, this Court can create such a right pursuant to its supervisory powers. Whether the right to receive exculpatory information in the guilty plea context is based in the Due Process Clause or this Court's supervisory powers, the following discussion of waiver is equally applicable.

not enhance the search for truth, id. at 204-05, the right to receive Brady information involves the disclosure of material evidence and therefore "*enhances* the truth-seeking function" of the federal criminal justice system. Id. at 204 (emphasis in original). To ensure this truth-seeking function, which is essential to the credibility of the federal courts, our guilty plea "system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties . . . ." Id. at 205 (quoting United States v. Olano, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring)). Indeed, because Brady does not simply bestow personal rights upon a defendant but also imposes obligations upon prosecutors that are designed to protect the integrity and truth-seeking purpose of the criminal justice system as a whole, see Kyles, 514 U.S. at 439, a defendant and a prosecutor cannot simply waive the decision's applicability in a plea agreement. Cf. Peretz v. United States, 501 U.S. 923, 937 (1991 ("a litigant may not waive structural protections"); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (private rights "charged or colored with the public interest" cannot be waived where waiver will defeat public interest).

In short, the credibility of the federal courts would be irreparably discredited by a rule which permitted the parties to avoid structural protections set forth by this Court to ensure the integrity of the criminal justice system as a whole. Of course,

the specific consequence of this end-run around these structural protections is the unsettling reality that federal courts could accept guilty pleas while prosecutors silently stand by knowing that there is information pointing to innocence.[20]

Finally, in half of a sentence, and without citation to authority, the government appears to assert the position it articulated below, a position that appears to have been otherwise abandoned at this stage of the proceedings. Specifically, it contends that waiver should be allowed "particularly with respect to the subset of information relating not to substantive evidence of guilt, but to the credibility of government witnesses." Pet. at 16. It is not surprising that this argument is without citation to authority and has now been relegated to half of a sentence, as the Court has definitively "rejected any such distinction between impeachment evidence and exculpatory evidence." Bagley, 473 U.S. at 676. In sum, the right to receive all exculpatory information, including impeachment information, cannot be waived in a plea agreement.

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[20] Not only is a non-waiver rule necessary to maintain the integrity of the federal courts and "some minimum of civilized procedure[,]" Mezzanatto, 513 U.S. at 204 (quoting United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)), but it is also required under other legal doctrines, such as contract and property law. See Plea Bargain Waivers, 68 Fordham L. Rev. at 2060-85 (discussing the doctrines of unconstitutional conditions, contract, property, and procedural due process in concluding that Brady rights cannot be waived).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Dated: December 7, 2001

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-595

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

ANGELA RUIZ,

RESPONDENT.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

ANGELICA HERNANDEZ, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court he served the within Brief in Opposition to the United States' Petition for Writ of Certiorari on the counsel for Petitioner by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to Theodore Olsen, Solicitor General of the United States, ATTN: Irving Gornstein, Assistant to the Solicitor General, Department of Justice Washington, D.C. 20530-0001; and included an original and ten (10) copies to Hon. William K. Suter, Clerk United States Supreme Court, 1 First Street, NE Washington, D.C. 20530 and depositing same in the United States mails at San Diego, California on December 7, 2001.

Angela Hernandez

ANGELICA HERNANDEZ, Affiant

Subscribed and Sworn to before me
this 7th day of December, 2001.

LEE ANN HUDSON
COMM. # 1249146
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. JAN. 11, 2004

Lee Ann Hudson

Notary Public in and for said
County and State.